No. 3758

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORSK HYDRO ELEKTRISK KVAELSTOF AKTIESELSKAB (a corporation) and BJARNE ERIKSEN (an individual),

Appellants,

vs.

CALIFORNIA & ORIENTAL STEAMSHIP COMPANY (a corporation),

Appellee.

FINAL BRIEF FOR APPELLEE.

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As defendants orally argued this case, and as plaintiff did not do so, and as defendants thereafter filed a reply brief, plaintiff desires to avail itself of the leave granted to it by this Court, and, in very few words, to comment upon several points advanced in such reply brief of defendants. It is respectfully submitted that all three conditions to the appointment of a receiver pendente lite as stated on page 3 of defendants' reply brief, are fulfilled by the record in the case at bar.

APPELLANTS' REPLY BRIEF, PAGES 9 TO 12.

Defendants fail to take the case at bar out of the principles stated in the decision of this Court in *Sternfels v. Watson,* 139 Fed. 505, and they do not mention *Jones v. Williams,* 24 Beav. 47. They attempt to avoid the former case, by saying, first, that Mathiesen, without any request having been made by them of him, volunteered to them the representation that he held the vessel in trust for C. Henry Smith. There is no support in the record for this assumption. Defendants' only endeavor to give it substance is the following assertion:

> "In the present case no more effective representation could have been made by the registered owner" (i. e. Mathiesen) "to the defendants that he held the registered title in trust for Smith than his recognition of Smith as the beneficial owner, a recognition plainly made to the defendants by *his taking and following the instructions of Smith to transfer the vessel to them as security for Smith's debts.*" (Appellant's Reply Brief, 10.)

There is not a syllable or a circumstance in the record to support the portion of this statement of appellants which we have italicized. It nowhere appears that Smith instructed Mathiesen to transfer the vessel to defendants "As security for Smith's debts". It does not appear in any way that Mathiesen even knew that Smith was indebted to defendants. Nor does it appear that he knew for what purpose the vessel was transferred. Furthermore, it does not even appear that Mathiesen ever had any "recognition of Smith as the bene-

ficial owner". It must always be borne in mind that C. Henry Smith was the president and general manager of plaintiff corporation. It must also be remembered that in Smith's letter to attorney Barth, dated *October 23rd, 1920,* Smith informed Barth plainly that the plaintiff corporation *"is the actual owner of the boat"* (appellee's first brief, 5, 4); and that only *two days later* Smith wrote Mathiesen about the vessel, informing Mathiesen that he had written to Barth, and had asked Barth to get in touch with Mathiesen (appellee's first brief 6); and that on *April 21st, 1921, ante litem motam,* Mathiesen, as a matter of course, without question or evidence of surprise, sent to Smith the cable quoted in appellee's first brief, page 9.

It is pertinent to note, also, that the letter which defendants quote on pages 10 and 11 of their reply brief was not written until *June 24th, 1921,* which was long after the controversy over the vessel had arisen, and that the copy of the letter from which the quotation is made *was produced by defendants, having been handed to them by Mathiesen* (Tr. 76). It was, therefore, a document of the most self serving order, both as to Mathiesen himself and as to defendants. But, even in it, Mathiesen discloses that he knew Smith was not the owner:

> *"How far* Mr. Smith has gone beyond *his power* is unknown to me, and has nothing to do with me." (Appellants' Reply Brief, 11.)

Defendant's attempt to avoid the case of *Sternfels v. Watson* by saying, secondly, that *if* defend-

ants *had* made inquiry of Mathiesen it *would have* disclosed "merely that he knew no one but Smith in the matter and held the registered title, subject to his sole direction" (appellants' reply brief, 10). But it is apparent from what has just been said, that Mathiesen did know plaintiff. Moreover, defendants in their opening brief, pages 6, 7, admit that the Court might reasonably conclude that there was a fair probability of establishing that *Mathiesen was trustee for plaintiff.* The only basis for defendants' *speculation* as to what Mathiesen *would have* said concerning for whom he held the vessel, *if* defendants *had* made inquiry of him, is the above mentioned highly self serving letter of *June 24th, 1921,* written *post litem motam.* Obviously, this does not take defendants out of the rule that:

> "the contingency that he (i.e. the trustee) might have denied the trust was no excuse for failure to make inquiry of him."
>
> *Sternfels v. Watson,* 507.

The language of Judge Sanborn in the case of *Geyser Marion Gold Min. Co. v. Stark,* 106 Fed. 558, which case is cited and quoted by this Court in *Sternfels v. Watson,* as noted in appellee's first brief, and which quotes from *Jones v. Williams,* conclusively answers defendant's contention:

> "The old excuse for this dereliction that the word 'trustee' pointed to no one but the trustee himself of whom inquiry could have been made, and that such an inquiry would have been idle because he who would violate his trust would make false answer is again presented. Its

futility has been often shown, and perhaps nowhere better than by Sir John Romilly, master of the rolls, in *Jones v. Williams,* 24 Beav. 62, where he said:

'*With respect to the argument that it was unnecessary to make any inquiry, because it must have led to no results, I think it impossible to admit the validity of this excuse.* I concur in the doctrine of *Jones v. Smith,* 1 Hare, 55, that a false answer or a reasonable answer given to an inquiry made may dispense with the necessity of further inquiry; *but I think it impossible beforehand to come to the conclusion that a false answer would have been given, which would have precluded the necessity of further inquiry.* A more dangerous doctrine could not be laid down, nor one involving a more unsatisfactory inquiry, namely, a hypothetical inquiry as to what A. would have said if B. had said something other than what he did say.'

It is no excuse for the failure to make any inquiry that such investigation, if made, might have failed to develop the truth."

Had defendants in the case at bar inquired of Mathiesen for whom he was trustee of the "Pacifico", he would have answered "For the California and Oriental Steamship Company". Had defendants then said "What is Smith's relation to that vessel?" he would have replied, "He is an officer or agent of that company". And, regardless of whether in fact he would have so answered, the law will not hear defendant's assertion that he would not have done so in the absence of inquiry of him on their part. It presumes that he would have done

so. The *very least* defendants were bound to do was to inquire of Mathiesen for whom he was trustee, and this they did not do.

APPELLANTS' REPLY BRIEF, Pages 12 to 16.

Perhaps we did not make plain the most obvious answer to defendants' contention that before plaintiff can recover the vessel it must pay to defendants or Smith the alleged advance made by Smith toward the purchase price. It is this: even assuming that the allegations in Smith's affidavit are to be given credence, the record shows, and defendants admit, for the purpose of this appeal, at least, that it shows that *Mathiesen was trustee for plaintiff.* That being so, we fail to follow the argument that before plaintiff can enforce that trust it must pay Smith or anyone claiming under him whatever sum Smith may have advanced toward the purchase price. If plaintiff had had the title transferred to plaintiff itself, instead of to Mathiesen, can it be doubted that title would have been in plaintiff, and that Smith would have been simply a creditor of plaintiff for the portion of the purchase price which he may have advanced? It is always to be borne in mind that plaintiff, even on defendants' assumptions, advanced $60,000. of the purchase price. Then, if Smith would have been only a creditor of plaintiff in the above case, how was he more than a creditor when the plaintiff, instead of having the title conveyed to itself, had it conveyed to Mathie-

sen *as trustee for plaintiff?* Why should not defendants, then, rather tender to plaintiff the portion of the purchase price which plaintiff paid, than demand that plaintiff tender to defendants the portion of the purchase price which they allege Smtih furnished?

Plaintiff's other answers to this contention of defendants it is submitted are sound and are sufficiently set out in its first brief, pages 43 to 46. It may be remarked, however, in connection with the last paragraph on page 45 of appellee's first brief, and the last paragraph on page 15 of appellants' reply brief, that the record nowhere shows *when* plaintiff was to repay to Smith the money alleged to have been advanced by him, or that Smith ever made any demand for it, or expected that it would be, or was entitled to have it, paid at any time heretofore. And, of course, defendants stand only in Smith's shoes in this respect.

It is submitted that the other contentions appearing in appellants' reply brief have been answered in appellee's first brief and require no further consideration here.

Dated, San Francisco,
November 14, 1921.

Respectfully submitted,

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